FILE COPY

No. 923

FILED
MAY 14 19
JAMES R. BROWNING

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1958

VINCENT DE NIRO, Petitioner,

vs.

STATE OF OHIO, EX REL.
THOMAS A. BEIL, PROSECUTING
ATTORNEY OF MAHONING COUNTY,
OHIO,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND OR ALTERNATELY, TO THE COURT OF COMMON PLEAS OF MAHONING COUNTY, OHIO.

PAUL W. BROWN
1004 Union Bank Bldg.
Youngstown, Ohio.
COUNSEL FOR PETITIONER

THOMAS BEIL, *Prosecuting Attorney*
HAROLD HULL, *Ass't. Prosecuting Attorney, For Respondent.*
Mahoning County Courthouse
Youngstown, Ohio

May 12, 1959

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1958

VINCENT DE NIRO, Petitioner,

vs.

STATE OF OHIO, EX REL.
THOMAS A. BEIL, PROSECUTING
ATTORNEY OF MAHONING COUNTY,
OHIO,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND OR ALTERNATELY, TO THE COURT OF COMMON PLEAS OF MAHONING COUNTY, OHIO.

PAUL W. BROWN
1004 Union Bank Bldg.
Youngstown, Ohio.
COUNSEL FOR PETITIONER

THOMAS BEIL, *Prosecuting Attorney*
HAROLD HULL, *Ass't. Prosecuting Attorney, For Respondent.*
Mahoning County Courthouse
Youngstown, Ohio

May 12, 1959

INDEX

		Page
1.	Citation to Opinion below.	1
2.	Jurisdiction	1
3.	Question presented.	2
4.	Constitutional and Statutory provisions.	3
5.	Statement of the case.	3
6.	Federal question raised.	4
7.	Circumstances relied upon for granting Writ and conclusions.	5
Appendix A	Opinion Supreme Court of Ohio	7
Appendix B	Opinion Court of Appeals	18
Appendix C	Ohio Revised Code 2915.02	22
Appendix D	Petition Trial Court	24
Appendix E	Preliminary Order	28
Appendix F	Ohio Revised Code 4301.73	30
Appendix G	U. S. Code Annot. Title 27 Sect. 34	32
Appendix H	Briefs of cases relied upon	34
Appendix I	Assignment of Errors, Court of Appeals	38

CITATIONS

	Page
Commonwealth ex rel Brown v. Marino 91 Pennsylvania Superior Court	261
In Re Cattell 146 Ohio State	112
Ex Parte Eiske 113 U.S.	713
Ex Parte Rowland 104 U.S.	604
State ex rel Bosch v. Denny's Place 98 Ohio Appellate	351
State v. Brush 149 N.E.	262
State of Ohio v. Morrow 57 Ohio Appellate	30
United States v. Auto City Brewing 279 Federal Reporter	132
United States v. Shipp 203 U.S. 563; 51 L. Ed.	319
United States v. United Mineworkers 330 U.S.	258
Ohio Revised Code 2915.02. Cited at	2-3
Ohio Revised Code 4301.73. Cited at	3
U. S. Code Annot. Title 27 Section 34. Cited at	3

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1958

NO.....

VINCENT DE NIRO, *PETITIONER*

vs.

STATE OF OHIO, EX REL THOMAS A. BEIL, PROSECUTING ATTORNEY OF MAHONING COUNTY, OHIO, *RESPONDENT.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND OR ALTERNATELY, TO THE COURT OF COMMON PLEAS OF MAHONING COUNTY, OHIO.

CITATION TO OPINIONS BELOW

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio in the cause entitled THE STATE OF OHIO EX REL BEIL, PROSECUTING ATTORNEY, Appellee v. DOTA; DOE (DENIRO), Appellant, officially reported in 168 Ohio State, p. 315; 154 N.E. 2d 634. (See Appendix "A").

This opinion affirmed the opinion of the Court of Appeals, Seventh Appellate District, dated October 9, 1957. (Unofficial, see Appendix "B").

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The decision of the Supreme Court of Ohio was dated December 2, 1958. Application for Rehearing was denied December 17, 1958. Mr. Justice Stewart, on March 16, 1959, signed an order extending the time within which a Petition for Writ of Certiorari might be filed in the United States

Supreme Court to include May 16, 1959. The jurisdiction of this court is invoked under 28 U.S.C. Section 1257.

It is maintained that the sentencing of the petitioner to jail for contempt of court, based upon petitioner's alleged violation of a void order padlocking a certain building, abuses the petitioner's immunity from being deprived of liberty without due process of law claimed under the Constitution of the United States.

Question Presented

Ohio Revised Code Section 2915.02, intended to permit the padlocking of premises if same were found on final hearing to be a nuisance by reason of gambling, also authorized temporary injunctions against the continuation of the gambling nuisance and against the removal of property useful or used in the gambling purposes. (Appendix C).

A Petition was filed by the Prosecuting Attorney of the County describing the premises, alleging them to be a nuisance in that gambling was permitted thereon, praying for temporary injunctions, as authorized, and further praying that on final hearing and upon finding by the Court that a nuisance existed, that the premised be ordered not used for any purpose for one year. (Appendix D).

At the same time, ex parte, without hearing or evidence other than the verified Petition, a temporary order was presented by the Prosecutor to the trial judge, which order was executed and journalized. This temporary order placed in effect an immediate padlock in addition to the temporary restraints authorized by the Statute. (Appendix E).

The contempt in this case was founded on the mere showing of the presence of the petitioner on the padlocked premises.

Petitioner maintains that the Court's order was void as to the padlock and hence, will not support a conviction for contempt.

Our question then is whether the entire procedure constitutes due process of law under the United States Constitution.

Constitutional and Statutory Provisions Invoked

The case involves the Fourteenth Amendment to the Constition of the United States.

The case also involves Ohio Revised Code Sections 2915.02, that being the gambling padlock law involved. (Appendix C).

The case indirectly involves Ohio Revised Code Section 4301.73. (Appendix F). This section is the padlock law having to do with cases involving liquor nuisances. This section has precisely the same language and is almost a direct copy of the United States padlock law contained in U. S. Code Annotated, Title 27, Section 34. (Appendix G).

As a result of this duplication of language, cases cited under all three Statutes are helpful. All of the foregoing are set out in summary in Appendix. (H).

Statement of the Case

Petitioner was found in the padlocked premises by the Sheriff the second day after same had been closed by the void temporary order. He gave as his explanation the following: petitioner had gone to the premises to pick up a lawn mower belonging to his mother, which had been loaned to a tenant in the building. This lawnmower was on an open porch. When the petitioner went around the building to get the lawnmower, he observed a rear door standing open. Petitioner had notice of the Court's order padlocking the building, and he was of the opinion that someone had broken in. He entered and shouted "who's in there". At that moment, the Sheriff, investigating reports that someone was answering phone calls made to the premises, broke into another door in a remote part of the building. DeNiro walked through the building to meet the Sheriff and was arrested.

State of the Record When Federal Question Raised

The trial court found the mere presence of DeNiro on the premises violated the padlock; refused to accept DeNiro's explanation, and sentenced DeNiro to thirty days in County Jail.

In the Court of Appeals, the defendant, entitled to a consideration of the weight of the evidence, the validity of the preliminary order padlocking the premises, and a further consideration of whether any evidence was introduced showing violation of a lawful part of the order, argued these things and was surprised in the Court of Appeal's opinion (Appendix B) to find this statement: "From that evidence, the trial judge could rightly assume that the appellant was there for a purpose violative of the order." The Appellate Court's opinion badly misquotes the evidence upon which the Appellate Court suggested that a presumption of defendant's purpose could be based.

In the Assignment of Error (No. 4) in the Ohio State Supreme Court, the defendant first raised the question of due process. (Appendix I).

The Supreme Court of Ohio, 168 O.S. 315, by a divided four-to-three decision, held at p. 318 as follows:

> "We agree with the defendant that the evidence will not support a finding that his presence on the premises was connected with gambling." (Appendix A).

The majority of the Court then held that the granting of the temporary injunction against use of the premises for any purpose extended the Court's power beyond that authorized by Ohio Revised Code Section 2915.02, but that the resulting order was voidable rather than void.

The majority relied on the opinion of the majority of the United States Supreme Court in *United States v. United Mineworkers of America, 330 U.S. 258, 91 L. Ed., 884; 67 S. Ct. 677*, in which the Court held that since the Court has power

to determine its jurisdiction in the first instance, a temporary injunction must be obeyed regardless of the jurisdictional determination on final hearing.

This, in effect, decided that the innocent entering of the padlocked premises by the defendant justified the imprisonment of the defendant for the violation of an order that has no historical precedent or statutory authority; an order that has never before in the history of American jurisprudence been found to be valid or necessary, and an order that was not prayed for by the petitioner, intended by the Court or required by the circumstances.

Circumstances Relied On For Allowance of the Writ

The manner of deciding the case is not in accord with the decision of this court in United States v. United Mineworkers of America (supra). The jurisdictional question as to whether a padlock may be applied ex parte is frivolous and a person imprisoned for violation of such an order should be released on habeas corpus.

Judges Taft, Bell, and Stewart of the Ohio State Supreme Court dissented in the opinion, holding that the jurisdictional claim of the trial court was frivolous and that "The unambiguous words of the Statute clearly disclose the lack of power of the Court to prohibit by a temporary injunction without bond the acts for the doing of which it (the trial court) held the defendant guilty of contempt."

It would seem that the impact and import of the United States v. United Mineworkers case upon established law needs to be clarified. The dangers visualized by the dissenters in the United States v. United Mineworkers case included the fear that the powers of a court in Habeas Corpus might be overthrown by the interpretations and extensions of the rule there expressed. Had any statute attempted to give the court

the power to issue a padlock order ex parte, that statute would have been unconstitutional. For the courts to permit such a result without statutory authority or common law precedent is usurpaton.

Respectfully submitted,

PAUL W. BROWN
Attorney for Petitioner
1004 Union Bank Bldg.
Youngstown, Ohio

RECEIPT OF COPY OF THE FOREGOING PETITION ACKNOWLEDGED THIS ..... DAY OF MAY, 1959.

THOMAS A. BEIL

Prosecuting Attorney for Relator-Respondent
Mahoning County Courthouse, Youngstown, Ohio

APPENDIX A

STATE, EX REL., *v.* DOTA.

Statement of the Case.

THE STATE, EX REL. BEIL, PROS. ATTY., APPELLEE, *v.* DOTA; DOE (DENIRO), APPELLANT.

Contempt of court—Violation of temporary injunction order—Premises used for gambling purposes—Use for any purpose temporarily enjoined—Section 2915.02, Revised Code—No defense that order erroneous or voidable.

Where a court, in an action instituted under the provisions of Section 2915.02, Revised Code, is satisfied that certain premises constitute a common nuisance, by virtue of their being used for gambling purposes, and orders, in a temporary injunction, that such premises "shall not be used for any purpose whatsoever until further notice of this court," the injunctive order must be obeyed unless modified of dissolved; and it is not a defense to an action in criminal contempt based upon a violation of such order that it is erroneous or voidable.

(No. 35456—Decided December 3, 1958.)

APPEAL from the Court of Appeals for Mahoning County

This is an appeal from a judgment of the Common Pleas Court of Mahoning County finding the respondent Vincent DeNiro, appellant herein and hereinafter called defendant, guilty of contempt of court in that he violated a temporary injunction issued by that court in an action instituted therein by the prosecuting attorney of Mahoning County under the provisions of Section 2915.02, Revised Code.

The pertinent part of Section 2915.02 reads as follows:

"Any room, house, building, boat, structure, or place used or kept for the purpose of gambling in violation of law, or in which such gambling is conducted or permitted, is hereby declared to be a common nuisance. An action to enjoin such common nuisance shall be brought in the name of the state, as plaintiff, against any person, firm, or corporation owning,

or claiming to own any present right, title, or interest in and to said premises, by the law officer of any muncipal corporation, by the prosecuting attorney of any county, or by the Attorney General with or without the request of the Governor. Such action shall be heard and determined in equity by any court of equitable jurisdiction in any county in which any such room, house, building, boat, structure, or place is situated. If it is made to appear, by affidavits or by competent testimony, to the satisfaction of the court, or judge in vacation, that such common nuisance exists as alleged in said action, the court upon proper application shall forthwith issue a temporary writ of injunction restraining the defendant from conducting or permitting the continuance of such common nuisance until the case is heard upon its merits. If requested in said application, the court may issue an order restraining the defendant and all other persons occupying, owning, or claiming to own any right, title or interest in the property which is the subject of the litigation from removing or in any way interfering with the fixtures or personal property kept or used in connection with the operation or maintenance of said alleged common nuisance.

"No bond is required in instituting such proceedings or as a condition precedent to the issuance of any temporary injunction or restraining order. It shall not be necessary for the court to find that the property involved constitutes a common nuisance, at the time of the hearing, but if the court finds that such property constituted a common nuisance, and that the material allegations of the petition are true, the court shall order said common nuisance to be abated and the maintenance thereof to be perpetually enjoined, perpetually enjoin said defendant from using, conducting, or permitting gambling in said room, house, building, boat, structure, or place, and order that the premises shall not be occupied or used for any purpose for one year from the date of said final judgment."

The petition of the prosecuting attorney alleges a violation of such section on the part of Frank Dota and John Doe and requests the issuance of a temporary injunction. The temporary injunction issued by the court reads in part as follows:

"This cause coming on to be heard before the Honorable David G. Jenkins on a petition for action for abatement of a common nuisance, temporary injunction, perpetual injunction and equitable relief, it is ordered, adjudged and decreed that a temporary injunction be and is hereby issued forthwith restraining the defendants herein above named and John Doe and all other persons from conducting or permitting continuance of the nuisance described in the petition herein, and restraining all of the defendants and other persons from using, conducting, permitting the playing of games of chance for money, of making wagers for money and engaging in other games of chance for money and other forms of gambling in, about or upon the real estate described in the petition; that the defendants and all other persons be enjoined from using the real estate described in the petition for or in conjunction with gambling in any form or manner.

"It is further ordered, adjudged and decreed that the hereinabove described real estate and the building located thereon used in connection with the operation and maintenance of said nuisances, shall not be used for any purpose whatsoever until further notice of this court."

Subsequent to the issuance of such temporary injunction, copies thereof were personally served upon Frank Dota and on defendant, referred to in the petition as John Doe, whom the deputy sheriff found on the premises involved in the dispute.

Pursuant to the provisions of the temporary injunction, on the same day that service thereof was made, the sheriff caused the premises to be locked, and such premises were considered by him to be "padlocked."

Two days thereafter, the sheriff was advised that someone had entered the "padlocked" premises, and he ascertained, through one of his deputies, that the telephone on said premises was being answered. Within minutes of such information, the sheriff, accompanied by some of his deputies, arrived at the premises and, after calling for admittance and knocking loudly, broke down a door, entered and found the defendant therein.

The sheriff thereupon arrested defendant, an order to show cause why he was not in contempt of the temporary injunction was issued, a hearing was had, and the defendant was found guilty of a violation of the temporary injunction and was given the minimum sentence prescribed for such violation by Section 2915.03, Revised Code, prescribing the punishment for a violation of an injunction issued pursuant to the provisions of Section 2915.02, *supra*.

Upon appeal to the Court of Appeals for Mahoning County, the judgment was affirmed.

The cause is before this court, pursuant to the allowance of a motion to certify the record and on an appeal as of right.

Opinion, per MATTHIAS, J.

Mr. Thomas A. Beil, prosecuting attorney, and *Mr. Harold H. Hull*, for appellee.

Mr. Paul W. Brown, for appellant.

MATTHIAS, J. The issue which is determinative of this appeal is whether, in an action commenced in the Common Pleas Court pursuant to the provisions of Section 2915.02, Revised Code, a temporary injunction, ordering, *inter alia*, that premises alleged to have been used for gambling purposes "shall not be used for any purpose whatsoever until further notice of this court," is void and subject to collateral attack in a subsequent contempt proceeding, or whether such temporary injunction must be obeyed implicitly until it is modified or dissolved.

Defendant contends that the evidence will not support even an inference that he was on the premises for a purpose in violation of the first paragraph of the temporary injunction, *i. e.*, that he was engaging in or using the premises for gambling; and that the second paragraph of the temporary injunction is void in the first instance, since the court has no power to restrain the lawful use of the premises in a temporary injunction, but only in a permanent injunction after a final hearing.

We agree with the defendant that the evidence will not support a finding that his presence on the premises was connected with gambling. The question remaining is whether his mere presence on the premises constituted a violation of the second paragraph of the temporary injunction, so that he could be found guilty of contempt of court.

The second paragraph of the temporary injunction clearly states that the premises "shall not be used for any purpose whatsoever."

Defendant, as indicated, argues that such order is void in that it attempts to extend the power of the court wih respect to temporary injunctions beyond that authorized by Section 2915.02, *supra*.

At this point we must note that the temporary injunction has not been attacked by anyone through a proceeding on a motion to dissolve or modify, the order in which has been held appealable by this court. See Section 2727.14, Revised Code, and *Trustees* v. *McClannahan*, 53 Ohio St., 403, 42 N. E., 34.

The subject of void and voidable injunctions has been much litigated, and the annotation in 12 A. L. R. (2d), 1059, indicates that there is not much conflict in the general rules enunciated by the various courts with respect thereto, although the application of such general rules to specific fact situations has produced varied results.

It is generally accepted that a court has no power to enforce an order or decree rendered by it without jurisdiction of either the subject matter or the parties. This court adhered generally to such rule in *In re Cattell*, 146 Ohio St., 112, 64 N. E. (2d), 416, 164 A. L. R., 312, wherein paragraphs five and six of the syllabus read as follows:

"5. Where a proper bond has not been given under Section 11882, General Code, a court or judge thereof is without jurisdiction to punish for a breach of an injunction issued pursuant to Section 11876, General Code.

"6. Where the statutory law of the state prescribes the terms and conditions under which an order of the Court of Common Pleas may become effective and further prescribes the punishment for a violation of such order, if effective, neither the Chapter of the General Code, Section 12136 *et seq.*, pertaining to contempt, nor the inherent right of the court to enforce its orders may be invoked."

Section 11882, General Code (Section 2727.07, Revised Code), the section referred to in paragraph five of the syllabus, above, read, in part, as follows:

"Unless otherwise provided by special statute, *no injunction shall operate* until the party obtaining it gives a bond * * *." (Emphasis added.)

Another general maxim relating to the question at hand is that, where a court has jurisdiction to make an order, the order is enforceable no matter how erroneous it may be. See 12 A. L. R. (2d), 1059, 1111, and cases cited.

It is said that, although in a sense every order which lacks jurisdictional support is erroneous, those which are erroneous for such lack of jurisdiction are void and subject to collateral attack, whereas those which are erroneous for other than jurisdictional reasons are merely voidable and not subject to collateral attack. It is the distinction between those orders which are fatally erroneous because of jurisdictional factors

and those which are erroneous for other reasons which presents the difficult question.

The case of *United States* v. *United Mineworkers of America*, 330 U. S., 258, 91 L. Ed., 884, 67 S. Ct., 677, was decided in 1947. The basic question before the court was the power of a District Court, in the light of the Norris-LaGuardia Act, to entertain an injunction action in a labor dispute involving persons who were alleged to be employees of the United States government, *i. e.*, its power or jurisdiction to issue the temporary injunction there in question restraining the strike threatened by the United Mine Workers, the violation of which resulted in the contempt action before the Supreme Court on appeal. That court held that, since a court has the power to determine its own jurisdiction in the first instance, a temporary injunction must be obeyed regardless of the jurisdictional determination on the final hearing.

The question of whether error is jurisdictional was also considered and discussed in the case of *Harrigan* v. *Gilchrist*, 121 Wis., 127, 227, 99 N. W., 909, wherein the court said:

"A court may have jurisdiction of a particular subject matter, but by settled judicial policy ought not to exercise it. Again, it may— by the settled law, established by its own practice, deemed to be as binding as the written law—have power in a conditional sense to adjudicate disputed matters of a particular character, acting by a recognized unbending principles of procedure, but not jurisdiction to adjudicate such matters in the particular way attempted. In either case it is common to say of an excessive use of authority, that the court is without jurisdiction. If the excess has reference to want of power over the subject matter, strictly so called, the result is void and may be successfully challenged directly or collaterally. If it has reference merely to the judicial method of exercising power, the result is binding upon the parties to the litigation till reversed or set aside in some of the ways

appointed by law. The former is usurpation; the latter error of judgment."

In a later Wisconsin case, *Cline* v. *Whitaker*, 144 Wis., 439, 129 N. W., 400, 140 Am. St. Rep., 1039, in which the *Harrigan case, supra*, is cited, the syllabus reads as follows:

"1. However erroneous an injunctional order may be in the sense of wrong or inexcusable use of judicial power, it is binding on the person restrained and efficiently notified thereof till set aside in some proper proceeding.

"2. The saying that an injunctional order is good till set aside, if the court making it had jurisdiction of the subject matter, is to be understood, as to the word 'jurisdiction,' to refer to the existence or nonexistence of judicial power, and as to the word 'subject matter' to such subjects between the parties.

"3. If, in a given situation, there is any valid ground upon which a temporary injunctional order might, under any circumstances, be properly issued, though none be stated in the complaint, and it would be highly erroneous, even jurisdictionally wrong in the sense of inexcusable use of judicial authority, to allow such an interference and such allowance nevertheless occurs, it is erroneous, not void, and cannot properly be defied."

To the same effect, see *Franklin Union No. 4* v. *People*, 220 Ill., 355, 77 N. E., 176, 110 Am. St. Rep., 248, 4 L. R. A. (N. S.), 1001; *Cummings-Landau Laundry Machine Co.* v. *Koplin*, 386 Ill., 368, 54 N. E. (2d), 462; *Wilber* v. *Woolley*, 44 Neb., 739, 62 N. W., 1095; *Miles* v. *State*, 74 Neb., 684, 105 N. W., 301; and *Ketchum* v. *Edwards*, 153 N. Y., 534, 538, 47 N. E., 918.

Applying the test set out to the instant case, we see that it *is* within the power granted to the Common Pleas Court by Section 2915.02, *supra*, in a permanent injunction, to issue an order forbidding the use or occupancy for any purpose of premises found to be a common nuisance by reason of gam-

bling activities conducted thereon. Since the Common Pleas Court of Mahoning County has the power to issue such an order, *i. e.*, power over the subject matter of forbidding the use or occupancy for any purpose of premises used for gambling, and its jurisdiction of the persons involved is not questioned, it follows that its order must be obeyed, regardless of whether such power was imprudently or prematurely exercised in a temporary injunction. Although an erroneous exercise of judicial power is a proper ground for a motion to modify or dissolve an injunction, it does not constitute a valid defense to an action in criminal contempt for the disobedience of such injunction.

It should be here noted that the application of the test herein set out seemingly results in a conflict between this case and the *Cattell case, supra*. The seeming conflict disappears, however, when it is realized that the wording of Section 11882, General Code, the section found to be dispositive of the *Cattell case*, made the giving of a bond a condition precedent to the validity of an injunction "*unless otherwise provided by special statute*," and Section 2915.02, *supra*, specifically provides that "no bond is required in instituting such [injunction] proceeding or as a condition precedent to the issuance of any temporary injunction or restraining order." Thus, the *Cattell case* is not disturbed by our finding herein.

The rules herein set out are in accord with the following statement of the Supreme Court of the United States in the *United Mine Worker's case, supra*, with which we are in whole-hearted accord:

"The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and willfully refuses his obedience, does so at his peril."

In conclusion:

1. We find that, since, on the final hearing, the trial court has the specifically granted power to forbid the use or occupancy for any purpose of the premises in question, the temporary injunction forbidding such use must be obeyed implicitly until dissolved or modified, regardless of any error committed by the trial court in its exercise of such power.

2. Keeping in mind that this court does not weigh the evidence but may determine the sufficiency thereof, we find that the evidence, actual and circumstantial, which was presented to the trial court in the contempt hearing was sufficient to justify the finding of that court that the defendant, having actual notice of its order, willfully violated it and is guilty of a criminal contempt of court.

For these reasons, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

WEYGANDT, C. J., ZIMMERMAN and HERBERT, JJ., concur.

STEWART, TAFT and BELL, JJ., dissent.

TAFT, J., dissenting. Section 2915.02, Revised Code, provides for an exception to the usual requirement of a bond as a condition to the issuance of a temporary injunction without bond; and it admittedly does not authorize a court to prohibit the doing of what this defendant has been held guilty of contempt for doing.

In *In re Cattell*, 146 Ohio St., 112, 64 N. E. (2d), 416, 164 A. L. R., 312, this court held that a temporary injunction issued without a bond, where no statute authorized such issuance without a bond, was void and subject to collateral attack. We have here a temporary injunction forbidding the doing of something that the court clearly had no specific authority to prohibit doing by a temporary injunction without a bond. Hence, to the extent that the order in the instant case

does that it is void and, as in the *Cattell case*, subject to collateral attack.

This conclusion is also supported by *United States* v. *United Mine Workers of America*, 330 U. S., 258, 91 L. Ed., 884, 67 S. Ct., 677. That case held that the Norris-LaGuardia Act did not deprive the District Court of power to issue an injunction. As an alternative ground for the decision, it was indicated that, even if it had deprived the court of such power, one who violated such injunction could be held guilty of criminal contempt. But, in so indicating, the court's opinion said:

"* * * a different result would follow were the question of jurisdiction frivolous and not substantial * * *. The applicability of the Norris-LaGuardia Act * * * in a case such as this had not previously received judicial consideration, and both the language of the act and its legislative history indicated the substantial nature of the problem * * *."

In the instant case, the unambiguous words of the statute clearly disclose the lack of power of the court to prohibit by a temporary injunction without bond the acts for the doing of which it held the defendant guilty of contempt.

STEWART and BELL, *JJ.*, concur in the foregoing dissenting opinion.

APPENDIX B.

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

State of Ohio, ex rel
Thomas A. Beil, Prosecuting Attorney,
Mahoning County, Ohio,

Plaintiff-Appellee,

- vs. -

Frank Dota, et al,

Defendants-Appellants

OPINION
Case No. 3953

APPEARANCES

Thomas A. Beil, *Prosecuting Attorney*, and H. H. Hull, *Assistant Prosecuting Attorney*, Youngstown, Ohio, for Plaintiff-Appellee.

Paul W. Brown, Youngstown, Ohio, for Defendant-Appellant.

Hon. John C. Nichols,
Hon. Lynn B. Griffith,
Hon. Elmer T. Phillips, JJ.

Dated: October 9, 1957

Grace Marten,
Court of Appeals Reporter,
Mahoning County Court House,
Youngstown, Ohio
PHILLIPS, J.

Acting under the provisions of Section 2915.02, Revised Code, the Prosecuting Attorney of Mahoning County filed a petition in the court of common pleas in the name of the State of Ohio alleging inter alia that defendants were at all times mentioned therein the owners in fee simple of the real estate described therein which is now and since about July 13, 1957, has been occupied by defendants, Frank Dota, John Doe, and other persons unknown, "and are now kept for the purpose and in conjunction with playing games of chance for money, of making wagers for money, and engaging in other games of chance for money and other forms of gambling, all in violation of the laws of the State of Ohio"; and praying for an order "abating the common nuisance herein set forth and restraining the defendants, herein above named and John Doe, and other persons unknown, from instigating, conducting or permitting the continuance of said common nuisance upon the" premises described in the petition and the "building located therein"; and praying that the building and parcel of land described in the petition "shall not be occupied or used for any purpose for one year from the date of said final judgment".

On July 22, 1957, the trial judge ordered inter alia that the real estate described in the petition and the building located thereon "used in connection with the operation and maintenance of said nuisances, shall not be used for any purpose whatsoever until further order of this court"; and that "the hereinabove described real estate and the building located thereon used in connection with the operation and maintenance of said nuisances, shall not be used for any purpose whatsoever until further order of this court".

Subsequently appellant, while admitting notice of the issuance of such restraining order, was found upon such premises, arrested upon warrant, held in jail for eight hours and brought before the trial judge on hearing to show cause why he should not be held in contempt of the court of com-

mon pleas. Upon full hearing appellant was found guilty of contempt of the court of common pleas and sentenced to jail for thirty days for violation of the order of the court of common pleas entered July 22, 1957.

Appellant, John Doe, a.k.a. Vincent DeNiro, appealed to this court on questions of law from the order of the trial judge finding him guilty of contempt for allegedly violating the order of the court of common pleas.

Appellant contends "that the entire proceedings are erroneous and that the order is contrary to law and against the manifest weight of the evidence"; that Section 2915.02, Revised Code, under which the restraining order was granted authorizes no such injunction as was issued in the case we review. Rather that section only authorizes issuance of an order restraining "gambling, or removal of gambling equipment" from the premises in question.

By assignments of error appellant contends that the trial judge erred in considering facts not in evidence and in excluding evidence offered by the defendant-appellant; that there is no evidence to support the findings of the court which are against the weight of the evidence; and that the decision of the court of common pleas appealed from is contrary to law.

There is evidence that the appellant went to the padlocked premises, found the door open and entered; that the Sheriff of Mahoning County was notified of some person being in the premises and using the telephone; that the Sheriff of Mahoning County went to such premises, found the door closed and locked, rapped for admission without response, broke into such premises and found appellant there. From that evidence the trial judge could rightly find that appellant was there for a purpose violative of his order.

It is stated in 91 Law Edition 886, syllabus 14, that:-

"An order issued by a court with jurisdiction over the

subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings, even though the statute under which the order is issued is unconstitutional."

In the case of Markovic v. State, 7 Ohio Law Abstract 491, it is said:-

"One who violates restraining order, may be punished for contempt, notwithstanding such restraining order was improvidently issued."

In 12 American Jurisprudence, Section 26, Page 407, it is said:-

"The violating or disobedience of an injunction order issued by a court having jurisdiction in the matter, when committed by a party to the injunction suit or by a third party, having actual notice, is a contempt of court and is punishable as such by the tribunal issuing the order; * * *. The only legitimate inquiry in a contempt proceeding, based upon the violation of an injunction, is whether the court granting it had jurisdiction of the parties and of the subject matter; the question whether the order was erroneous will not be considered. If the court had the jurisdiction required, the fact that its power was erroneously exercised does not render the injunction void, but only voidable on proper application; and, until set aside or revoked, it is entitled to implicit obedience. * * *."

Finding no error in any of the respects urged by the appellant in oral argument or brief the judgment of the trial court finding appellant guilty of contempt must be and is affirmed hereby.

Nichols, P. J., Concurs.

Griffith, J., Concurs.

APPENDIX C
OHIO REVISED CODE 2915.02

INJUNCTION MAY ISSUE.

Any room, house, building, boat, structure, or place used or kept for the purpose of gambling in violation of law, or in which such gambling is conducted or permitted, is hereby declared to be a common nuisance. An action to enjoin such common nuisance shall be brought in the name of the state, as plaintiff, against any person, firm, or corporation owning, or claiming to own any present right, title, or interest in and to said premises, by the law officer of any municipal corporation, by the prosecuting attorney of any county, or by the attorney general with or without the request of the governor. Such action shall be heard and determined in equity by any court of equitable jurisdiction in any county in which any such room, house, building, boat, structure, or place is situated. If it is made to appear, by affidavits or by competent testimony, to the satisfaction of the court, or judge in vacation, that such common nuisance exists as alleged in said action, the court upon proper application shall forthwith issue a temporary writ of injunction restraining the defendant from conducting or permitting the continuance of such common nuisance until the case is heard upon its merits. If requested in said application, the court may issue an order restraining the defendant and all other persons occupying, owning, or claiming to own any right, title, or interest in the property which is the subject of the litigation from removing or in any way interfering with the fixtures or personal property kept or used in connection with the operation or maintenance of said alleged common nuisance.

No bond is required in instituting such proceedings or as a condition precedent to the issuance of any temporary injunction or restraining order. It shall not be necessary for

the court to find that the property involved constitutes a common nuisance, at the time of the hearing, but if the court finds that such property constituted a common nuisance, and that the material allegations of the petition are true, the court shall order said common nuisance to be abated and the maintenance thereof to be perpetually enjoined, perpetually enjoin said defendant from using, conducting, or permitting gambling in said room, house, building, boat, structure, or place; and order that the premises shall not be occupied or used for any purpose for one year from the date of said final judgment. The court may permit the premises to be occupied or used for lawful purposes within said one year period upon condition that the owner, lessee, tenant, or occupant thereof gives bond with sufficient surety, which is approved by the court rendering said final judgment, in the penal and liquidated sum of not less than one thousand nor more than five thousand dollars, payable to the state, and conditioned that no gambling will be conducted or permitted therein in violation of law during said one year period and that the principal thereof will pay all fines, costs, and damages that are assessed for any violation of the gambling laws upon said property.

Service on said defendant shall be the same as for civil actions.

APPENDIX D

IN THE COURT OF COMMON PLEAS

Case No. 152519

State of Ohio, ex rel Thomas A. Beil Prosecuting Attorney Mahoning County, Ohio *Plaintiff* - vs. - Frank Dota Address Unknown Dry Men's Social Club c/o Coffee Shop Yo. New Castle Road, Rt. 422, Mahoning County, Ohio John Doe, et al Address Unknown *Defendants*	Petition for Abatement of a Common Nuisance, Temporary Injunction, Perpetual Injunction, and Equitable Relief.

Now comes the State of Ohio by Thomas A. Beil, the duly elected, qualified and acting Prosecuting Attorney for Mahoning County, Ohio, and brings this action under the authority of Section 2915.02 of the Revised Code of Ohio and for its cause of action herein says that the Defendant, Frank Dota was at all times hereinafter mentioned and is now the owner in fee simple of the following described real estate situated in the Township of Coitsville, County of Mahoning, State of Ohio, known as

In great lot 13 of Coitsville Township, known as part of Tony Galluppi lands, bounded and described as follows: Beginning at an iron pin in the center line of the Youngstown-New Bedford Road where the same (is) intersected by the westerly line of Galluppi Ave. as dedicated and recorded in Volume 28, at Page 252 of the Mahoning County records of plats; thence north 4°00′ east along the westerly line of the Galluppi Ave. a distance of 261.94 feet to an iron pin; thence north 81°45′ west a distance of 115.31 feet to an iron pin; thence south 4°00′ west a distance of 270.60 feet to a point in the center line of the Youngstown-New Bedford Road; thence south 85°38′ east along the original center line of the Youngstown-New Bedford Road a distance of 115 feet to the place of beginning and contains .704 acres of land to be the same more or less but subject to all legal highways.

and the parking lot and one story concrete block and yellow brick "L" shaped building which is situated on the above described parcel of real estate. This one story structure known as "The Coffee Shop" is located approximately 40 feet from the northern boundary line of U. S. Route 422 and is on the north side of this highway.

The State of Ohio further says that the hereinabove described parcel of real estate and that the hereinabove described building located thereon, were at all times hereinafter mentioned and are now occupied and operated jointly by the Defendants herein above named and John Doe and other persons unknown.

The State of Ohio says further that the hereinabove described parcel of real estate and the hereinabove described building located thereon, have been since approximately July 13, 1957, and are now kept for the purpose and in conjunction with playing games of chance for money, of asking wagers for money, and engaging in other games of chance for

money and other forms of gambling, all in violation of the laws of the State of Ohio.

The State of Ohio further says that since July 13, 1957, and up to and including the present time, the hereinabove described parcel of real estate and the hereinabove described building located thereon, were kept for the purpose and in conjunction with the conducting of dice games known as "craps" for money and card games known as "poker" for money, all in violation of the laws of the State of Ohio.

The State of Ohio further says that the hereinabove described parcel of real estate and the hereinabove described building located thereon, have been kept, maintained, and operated jointly by the Defendants hereinabove named and John Doe and other persons unknown, wholly and solely for the purpose of playing games of chance for money, of making wagers for money, and of engaging in other games of chance for money and the other forms of gambling, all in conspiracy to violate the laws of the State of Ohio.

The State of Ohio further says that the above acts, all and singularly, present and constitute a common nuisance in violation of the laws of Ohio and the common nuisance created thereby by these Defendants, their agents and employees, and by other persons occupying and operating these premises, will continue unless restrained and abated by order of this court since the State of Ohio has no adequate remedy at law.

Wherefore by reason of the above, all and singular, the State of Ohio prays that a temporary writ of injunction be forthwith issued from this Court abating the common nuisance herein set forth and restraining the Defendants, herein above named and John Doe, and other persons unknown, from instigating, conducting or permitting the continuance of said common nuisance upon the above described parcel of real estate and in the above described building located thereon and restraining the defendants and all other persons oc-

cupying said premises from removing or in any way interfering with the fixtures or personal property kept or used in connection with the operation and maintenance of the hereinabove described nuisance until further order of the Court provided however, that the State of Ohio may confiscate all gambling equipment, apparatus, and paraphernalia in and upon said premises and further that the Sheriff be hereby ordered to forthwith enter said building, inventory and confiscate all gambling equipment, apparatus and paraphernalia as evidence and that on final hearing said common nuisances may be ordered abated and a permanent writ of injunction issued perpetually enjoining the maintenance of said nuisances and permanently enjoining the said Defendants and all other persons from using, conducting, permitting the playing of games of chance for money, making wagers for money and of engaging in other games of chance for money and other forms of gambling, and that said Defendants and all other persons be perpetually enjoined from using or maintaining said real estate and premises in conjunction with any other gambling of any other kind in or about said premises and further ordering that the above described building and the hereinabove described parcel of real estate shall not be occupied or used for any purpose for one year from the date of said final judgment and that said Defendants be required to pay the costs of this action and for such relief in the premises as may be just and proper.

THOMAS A. BEIL
Prosecuting Attorney
Mahoning County

APPENDIX E

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

STATE OF OHIO, EX REL THOMAS A. BEIL, PROSECUTING ATTORNEY MAHONING COUNTY, OHIO *Plaintiff* vs. FRANK DOTA, ET AL *Defendants*	No. 152519 (TEMPORARY ORDER TRIAL COURT)

This cause coming on to be heard before the Honorable DAVID C. JENKINS on a petition for action for abatement of a common nuisance, temporary injunction, perpetual injunction and equitable relief, it is ordered, adjudged and decreed that a temporary injunction be and is hereby issued for the purpose of restraining the Defendants herein above named and John Doe and all other persons from conducting or permitting continuance of the nuisance described in the petition herein, and restraining all of the Defendants and other persons from using, conducting, permitting the playing of games of chance for money, of making wagers for money and engaging in other games of chance for money and other forms of gambling in, about or upon the real estate described in the petition; that the Defendants and all other persons be enjoined from using the real estate described in the petition for or in conjunction with gambling in any form or manner.

It is further ordered, adjudged and decreed that the hereinabove described real estate and the building located thereon

used in connection with the operation and maintenance of said nuisances, shall not be used for any purpose whatsoever until further order of this Court.

It is further ordered, adjudged and decreed that the State of Ohio may confiscate all gambling equipment, apparatus, and paraphernalia, that the Sheriff is hereby ordered to forthwith enter said building, inventory and confiscate all gambling equipment, apparatus and paraphernalia as evidence.

It is further ordered, adjudged and decreed that a copy of this order of temporary injunction be affixed by the Sheriff to the main entranceway and all other outside doors of the building described in the petitio..

DAVID G. JENKINS
Judge

APPENDIX F

OHIO REVISED CODE 4301.73

PLACE WHERE BEER OR INTOXICATING LIQUOR IS SOLD DECLARED A NUISANCE.

Any room, house, building, boat, vehicle, structure, or place where beer or intoxicating liquor is manufactured, sold, bartered, possessed, or kept in violation of law, and all property kept and used in maintaining the same, and all property designed for the unlawful manufacture of beer or intoxicating liquor, and beer or intoxicating liquor contained in such room, house, building, boat, structure, or place is a common nuisance.

An action to enjoin such nuisance may be brought in the name of the state by the attorney general or by any prosecuting attorney of any county or any officer of the law of any municipal corporation or by the department of liquor control.

Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it appears, by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the beer or intoxicating liquor, property designed for the manufacture of beer or intoxicating liquors, fixtures, or other things, used in connection with the violation of this section, constituting such nuisance.

No bond shall be required in instituting such proceedings. The court need not find the property involved was being un-

lawfully used at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no beer or intoxicating liquors shall be manufactured, sold, bartered, possessed, kept, or stored in such room, house, building, structure, place, boat, or vehicle, or any part thereof.

Upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, place, boat or vehicle shall not be occupied or used for one year thereafter; but the court may permit it to be occupied or used if its owner, lessee, tenant, or occupant gives a bond with sufficient surety, to be approved by the court making the order, in the sum of not less than one thousand nor more than five thousand dollars, payable to the state, and conditioned that beer or intoxicating liquor will not thereafter be manufactured, sold, bartered, possessed, kept, stored, transported, or otherwise disposed of therein in violation of law, and that h[illegible] will pay all fines, costs, and damages that may be assessed for any such violation. For closing the premises and keeping them closed, a reasonable sum shall be allowed the officer by the court.

APPENDIX G

U. S. CODE ANNOTATED

TITLE 27, SEC. 34

Abatement of Nuisance: Injunction: Procedure: Bond By Owner or Lessee of Building.

An action to enjoin any nuisance defined in this chapter may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue, restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this chapter constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the Court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, build-

ing, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than $500 nor more than $1,000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this chapter upon said property.

EXHIBIT H

U. S. v. Auto City Brewing Co., et al

279 Fed. Reporter p. 132

U. S. District Court, Michigan

Syllabus, paragraph 3

"The authority given by National Prohibition Act to issue a temporary order restraining the defendants from removing or interfering with liquor or fixtures used in violation of the act does not authorize a temporary restraining order enjoining the defendants from exercising any control over the property;"

and later on the Court says:

"to restrain all use of property is to extend the scope of the injunction power of the Court far beyond the imposition of restraint upon only the removal of such property * * *. It is therefore manifest that a temporary injunction restraining them from exercising any control over such property as prayed here would be without authority."

State vs. Brush, 149 N.E. 262

"The decree of the County Court of Christian County, so far as it purported to enjoin the plaintiff in error from manufacturing, selling or keeping intoxicating liquor on any premises in the State of Illinois is *void*. (It is not within the general powers of a court of equity and is not authorized by the statute) (National Prohibition Act. Since the decree was void, the plaintiff in error was not guilty of contempt of court if he disregarded it.

The Court at p. 310 said the Prohibition Act had not conferred any such power on the Court, and that the power of the legislature to confer such power may be doubted."

This case is cited with approval in—

STATE EX REL BESCH V. DENNY'S PLACE 98 OHIO APPELLATE 351

A case regarding a contempt growing out of the violation of an order in a padlock case. Court ordered no sale of liquor at the location described or by the named defendant elsewhere in county. Court held that part of order was *void*.

The test seems to be established in—

STATE OF OHIO, APP. V. MORROW, APPELLANT 57 OHIO APPELLANT 30

Court ordered newspaper not to print grand jury list. Cited them for contempt.

"The judge did not possess the power, either by legislative enactment or inherently by virtue of his office to make such an order; that therefore the order was unlawful, and that the violation of the same by the respondent was not a contempt of court."

COMMONWEALTH EX REL BROWN *v.* MARINO 91 PENNSYLVANIA SUPERIOR COURT 261,

Regarding an identical order and an identical statute

"It is also obvious that the definite expression of the power granted by the statutes works the limit of the Court's action: the court is not authorized to go beyond what is so defined . . .

As the statute in defining what may be done by temporary injunction does not authorize an order putting a party out of his property until after final hearing (padlocking the property) the decree must be modified."

In Re: Cattell 146 O.S. 112; and State of Ohio, Appellee v. Morrow, Appellant 57 O.A. 30, which says:

"The judge did not possess the power, either by legislative enactment or inherently by virtue of his office to make such an order; that, therefore, the order was unlawful and that the violation of the same by the respondent was not a

contempt of Court." See also, *12 Ruling Case Law, P. 1211*, under the heading *Habeas Corpus, Sec. 30*, where it is stated:

"If a Court is (1) without jurisdiction of the subject matter or the party, or (2) *lacks power to make the order in the particular case*, it cannot punish for contempt and habeas corpus may be invoked to avoid such imprisonment."

UNITED STATES v. UNITED MINEWORKERS
330 U.S. 258

This case held that the Court's inherent power to issue a temporary order the purpose of preserving conditions pending a decision upon its own jurisdiction was not abridged by Clayton and Norris-LaGuardia Acts.

This holding seems to be the justification used by the majority in subject case, State ex rel Beil vs. Dota (DeNiro) 168 OS 315, in justifying Court's decision that contempt finding was enforceable even though the trial court was obviously without authority to issue the order upon which the finding of guilt was based.

The Ohio courts in the decision in the instant case bear out the reasonableness of the fears of the dissent in United States v. United Mineworkers supra; and especially, the comments regarding the effect of that decision on the principle expressed in Ex Parte Fiske 113 U.S. 713 and in Ex Parte Peter M. Rowland 104 U.S. 604.

Mr. Justice Frankfurter, concurring in the judgment, noted that a judge who tried to circumvent an obvious limitation upon a court by a frivolous inquiry into jurisdiction would be "a pretender to and not a wielder of judicial power."

Mr. Justice Murphy, at page 352 of the opinion, says "Free speech and freedom of assembly .... these and other constitutional rights would be nullified by the force of invalid orders issued in flat violation of the constitutional provisions securing them and void for that reason."

Justice Murphy's dissent, p. 361, went on to say that United States vs. Shipp 203 U.S. 563, 51 L. Ed. 319 (and by inference U. S. v. United Mineworkers supra) "did not overrule nor was it in any way inconsistent with the long prior course of decisions holding that when an order is void for want of jurisdiction, it may be disobeyed with impunity pending but depending upon determination of its invalidity by appeal, habeas corpus or other mode of review."

APPENDIX I

STATE OF OHIO COUNTY OF MAHONING SS. STATE OF OHIO, ex rel THOMAS A. BEIL, Pros. Atty., *Appellee* - vs. - FRANK DOTA, ET AL, *Appellants*	IN THE SUPREME COURT CASE NO. 35456 ASSIGNMENT OF ERROR

ASSIGNMENTS OF ERROR

The Defendant-Appellant says that the judgment of the Court of Appeals of the Seventh Judicial District entered in the within cause on the 9th day of October, 1957, is erroneous and against the just rights of the Appellant in the following respect.

1. The Court of Appeals should have reversed the judgment of the Court of Common Pleas and should have released and discharged the Defendant-Appellant.
2. The Court of Appeals was in error in drawing inferences from the testimony in order to affirm the action taken by the Trial Court. (Court of Appeals Opinion, Page 18, Appendix B, Brief).
3. The Court of Appeals erred in failing to find void the original order issued by the Trial Court, and which the Defendant-Appellant was found guilty of violating.
4. The Court of Appeals, in finding that the Trial Court was justified in assuming that the Defendant was on the premises for a purpose violative of the order, violated the Defendant's rights under the Constitution of the State of Ohio and the United States of America.

RESPECTFULLY SUBMITTED,
PAUL W. BROWN
Attorney for Defendant-Appellant

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 29 1959
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 923

VINCENT DE NIRO,

Petitioner,

vs.

STATE OF OHIO, ex rel. THOMAS A. BEIL,
Prosecuting Attorney of Mahoning County, Ohio,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for a Writ of Certiorari.

THOMAS A. BEIL,
Prosecuting Attorney,

HAROLD H. HULL,
Assistant Prosecuting Attorney,
Mahoning County Courthouse,
Youngstown, Ohio,
Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5547

TABLE OF CONTENTS.

History of Case 1

The Law 4

Supreme Court of the United States 4

State of Ohio 6

Disobedience of Order and Violation of Injunction 6

Appellant's Action Constituted Contempt 7

Justice Frankfurter 11

Harvard Law Review 11

TABLE OF AUTHORITIES.

Cases.

Cloverleaf Restaurant vs. Lenihan, 80 Ohio Appellate Reports 477 6

Fawick Co. vs. United Electrical Workers, 56 O. L. Abs. 65 7

Fawick Co. vs. United Electrical Workers, 90 Ohio Appellate Reports 24 6

Markovic vs. the State, 7 O. L. Abs. 491 7

Miller, Ex parte, 87 Am. St. Rep. 49 10

Shipping Room Suppliers vs. Schoenlaub, 97 N. E. (2nd) 432, C. P. Franklin Co., Ohio 10

Socotch vs. Board of Liquor Control, 66 O. L. Abs. 225 10

State, ex rel., Bruns Coal Company vs. United Mine Workers, 63 O. L. Abs. 531 9

State, ex rel. vs. Compton, 96 Ohio Appellate Reports 541 6

State, ex rel. vs. Denny's Place, 98 Ohio Appellate Reports 351 8

Taylor vs. Holmes, 96 Ohio Appellate Reports 181 6

U. S. vs. United Mineworkers, 330 U. S. 258 4

Texts.

12 *Am. Jur.* "Contempt," Sec. 26, p. 407 9

12 *Am. Jur.* "Contempt" Sec. 26, page 408 10

Harvard Law Review, June, 1959, Vol. 72, No. 8 11

Statute.

Ohio Revised Code, Sec. 2915.02 1

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. _____

VINCENT DE NIRO,

Petitioner,

vs.

STATE OF OHIO, *ex rel.* THOMAS A. BEIL,
Prosecuting Attorney of Mahoning County, Ohio,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for a Writ of Certiorari.

HISTORY OF CASE.

A Petition was filed in the Court of Common Pleas in Mahoning County, Ohio, by Thomas A. Beil, as Prosecuting Attorney of said County, and was filed in the name of the State of Ohio. It was brought under R. C. 2915.02 of the Revised Code, relating to Gambling, which section provides, in part, "The Court upon proper application shall forthwith issue a temporary Writ of Injunction restraining the petitioner from conducting or permitting the continuance of such common nuisance until the case is heard upon its merits. * * *"

A hearing was had, witnesses duly sworn and testified. A temporary Order was granted by the Court, as follows:

> "This cause coming on to be heard before the Honorable David G. Jenkins on a petition for action for abatement of a common nuisance temporary injunction, perpetual injunction and equitable relief, it is ordered, adjudged and decreed that a temporary

injunction be and is hereby issued forthwith restraining the Defendants herein above named and John Doe and all other persons from conducting or permitting continuance of the nuisance described in the petition herein, and restraining all of the Defendants and other persons from using, conducting, permitting the playing of games of chance for money, of making wagers for money and engaging in other games of chance for money and other forms of gambling in, about or upon the real estate described in the petition; that the Defendants and all other persons be enjoined from using the real estate described in the petition for or in conjunction with gambling in any form or manner.

"It is further ordered, adjudged and decreed that the hereinabove described real estate and the building located thereon used in connection with the operation and maintenance of said nuisances, shall not be used for any purpose whatsoever until further order of this Court. * * *

"It is further ordered, adjudged and decreed that a copy of this order of temporary injunction be affixed by the Sheriff to the main entranceway and all other outside doors of the building described in the petition."

The above Order by the Court was, by Deputy Sheriff, personally served upon the petitioner and by him read in the presence of the Deputy.

Several days thereafter the Sheriff received a telephone call conveying the information that one of the phones on the premises in question was being answered by someone. He, together with several other Deputies, went to the premises, but when about a mile away therefrom one of the Deputies stopped telling the Sheriff he would use a phone and if the phone was answered, he would radio the Sheriff to that effect. The Deputy did

just this and when the phone was answered he returned to his car and radioed the Sheriff that there was some person in the premises. The Deputy then proceeded to rejoin the Sheriff. On the Sheriff's arrival there was no response to his knocks on the door to gain admission, whereupon the door was broken down, the Sheriff entered and found the petitioner therein—alone.

The Sheriff thereupon arrested the petitioner and took him to the County Jail. The matter was reported to the Court, who thereupon issued an Order for the petitioner to show cause why he was not in contempt by being on the premises.

Pursuant to the order of the Court, the Sheriff filed the following affidavit:

> "Paul J. Langley, being first duly sworn, deposes and says that he is the duly elected, qualified and acting Sheriff of Mahoning County, Ohio, and that on the 24th day of July, 1957, he had occasion to go to the premises mentioned and set forth in the Petition, wherein which premises are occupied by 'The Coffee Shop' in the front of the building and the space to the rear thereto being occupied by the 'Dry Men's Social Club' and that on arrival at said place, in company with several Deputy Sheriffs, he sought admission by knocking on the door, and upon such admission being refused he broke open the door, entered and found therein one Vincent DeNiro (the Petitioner), whose presence at the place and at the time was in violation of the order of this Court, entered July 22, 1957, as follows:
>
> 'It is further ordered, adjudged and decreed that the hereinabove described real estate and the building located thereon, used in connection with the operation and maintenance of said nuisances, *shall not be used for any purpose whatsoever* until further order of this Court.' (Emphasis ours.)

whereupon the said Vincent DeNiro was taken into custody by the Sheriff and Chief Deputy Reese and incarcerated in the County Jail, pending the action of the Court."

After hearing witnesses the Court found him guilty of contempt and sentenced him to imprisonment in the County Jail for a period of thirty days and to pay costs of the contempt proceedings. His conviction was affirmed by the Court of Appeals and the Supreme Court.

The jurisdiction of the Court over the petitioner and the subject matter was never questioned by the petitioner.

THE LAW.

SUPREME COURT OF THE UNITED STATES.

"Order must be obeyed until reversed even though statute under which order is issued is unconstitutional.

"Violation of a Court Order is punishable as a contempt, even though Order is set aside on appeal as in excess of the Court's jurisdiction."

U. S. vs. United Mineworkers, 330 U. S. 258.

Excerpts taken from the opinion in the above case follow:

Page 290.—"If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery. Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 450."

Page 292.—"Application of the rule laid down in United States v. Shipp, supra, is apparent in Carter v. United States, 135 F. 2d 858." * * * "But in Carter, a companion case, violations of the temporary restraining order were held punishable as criminal con-

tempt. Pending a decision on a doubtful question of jurisdiction, the District Court was held to have power to maintain the status quo and punish violations as contempt."

"It cannot now be broadly asserted that a judgment is always a nullity if jurisdiction of some sort or other is wanting. It is now held that, except in case of plain usurpation, a court has jurisdiction to determine its own jurisdiction, and if it be contested and on due hearing it is upheld, the decision unreversed binds the parties as a thing adjudged. Treinies v. Sunshine Mining Co., 308 U. S. 66."

Pages 293-294.—"Proceeding further, we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued. In Howat v. Kansas, 258 U. S. 181, 189-90, this Court said:

> "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

"Violations of an order are punishable as criminal contempt even though the order is set aside on appeal,

Worden v. Searls, 121 U. S. 14, or though the basic action has become moot, Gompers v. Bucks Stove & Range Co., 221 U. S. 418."

STATE OF OHIO.

Disobedience of Order and Violation of Injunction.

An Order issued by a Court having jurisdiction of the subject matter and the persons must be obeyed until such Order is reversed or stayed by orderly and proper proceedings.

Fawick Co. vs. United Electrical Workers, 90 Ohio Appellate Reports 24.

Deputy Sheriffs, appointed by virtue of a Court Order for the purpose of enforcing the terms of an injunction, are officers of the Court and violations of the terms of such injunction in the presence of such Deputies is, constructively, a violation in the presence of the Court.

State, ex rel. vs. Compton, 96 Ohio Appellate Reports 541.

A person guilty of disobedience of a judgment of a Court may be punished as for contempt.

Taylor vs. Holmes, 96 Ohio Appellate Reports 181.

An order issued by a Court with jurisdiction of the subject matter and person must be obeyed by the parties, however erroneous the action of the Court may be until the Order is reversed by orderly and proper proceedings.

Cloverleaf Restaurant vs. Lenihan, 80 Ohio Appellate Reports 477.

In a proceeding in contempt based upon the violation of an Order of the Court one may not in defense assert the validity of the order on other than jurisdictional grounds.

Fawick Co. vs. United Electrical Workers, 56 O. L. Abs. 65.

Appellant's Action Constituted Contempt.

In the case of *Markovic vs. the State*, 7 O. L. Abs. 491, the Court of Appeals—7th District—Mahoning County, the question before the Court was:

"If the court is without jurisdiction in issuing an order, which order is subsequently violated, can such court legally punish for contempt?"

The syllabus in the *Markovic* case, *supra*, reads:

"One who violates restraining order, may be punished for contempt, notwithstanding such restraining order was improvidently issued."

The Court, in its Opinion, spoke as follows:

"Concerning the second ground of alleged error it seems to assume that the action in which the contempt proceeding is alleged to have occurred, grew out of a restraining order, under what is commonly known as the padlock law, was based upon a violation of the liquor law, and that the convictions which the petition sets forth were based upon a city ordinance governing the possession of intoxicating liquors, which ordinance this court has heretofore found to be illegal and void by reason of penalty provided for in excess of that authorized by statute."

Syl. 3. "Where a court is petitioned to abate a nuisance under Section 13195-1 et seq., General Code, and finds that a common nuisance exists in the opera-

tion of premises wherein intoxicating liquor is sold illegally, and decrees that the owner of such premises be permanently enjoined and restrained 'from selling or dealing in or serving beer or intoxicating liquor or beverages * * * at the premises * * * or in any place' in such county without a permit or in violation of law, the injunction against the sale of intoxicating liquor on the premises is entirely separate and distinct from the general provision against sales elsewhere in the county, and the invalidity of the latter provision does not affect the validity of the former."

State, ex rel. vs. Denny's Place, 98 Ohio Appellate Reports 351.

The Court, in its Opinion, page 355, said:

"In Sullivan v. State, 191 Ark., 180 83 S. W. (2d); 824, similar provisions in an injunction were reviewed in a contempt proceeding. The provision violated, however, was that enjoining the sale, etc., of intoxicating liquor on the premises (Old Heidelberg Inn) on which common nuisance had been maintained. The Court, at page 184, said:

'It must be conceded that a proceeding of this kind is to abate a nuisance conducted at a particular place. If it be conceded that, to the extent that the court enjoined W. E. Sullivan from the sale of liquor "elsewhere in Pulaski County," the order was in excess of power, that in no particular impairs the validity of the restraint insofar as it related to Old Heidelberg Inn.'

* * *In the case at bar, the injunction against the sale of intoxicating liquor at Denny's Place is entirely separate and distinct from the general provision against sales elsewhere in Butler County, and the invalidity of the latter provision does not affect the former. * * *"

Syl. 3. "The power to maintain order and to enforce process to the end that effect may be given to judgments, must inhere in every court or the purpose of its creation fails. Without such power no other could be exercised."

Syl. 4. "The County Sheriff, to whom is entrusted the preservation of the peace, is empowered not only to repel and repress any attempted violation of such order but to arrest, detain and incarcerate such person or persons as persist in seeking to do so, informing the person or persons arrested of his authority and cause of the arrest."

Syl. 5. "The law of a case as enunicated by a common pleas court is as much a part of the law of the State of Ohio to be observed and enforced as is a state statute, or city or village ordinance, the language of Sec. 13432-1 G. C., using the general and generic term 'law' and not the word 'statute' whose meaning is restricted to legislative law."

State, ex rel., Bruns Coal Company vs. United Mine Workers, 63 O. L. Abs. 531.

"The violation or disobedience of an injunction order issued by a Court having jurisdiction in the matter, when committed by a party to the injunction suit or by a third party, having actual notice is a contempt of Court and is punishable as such by the tribunal issuing the order." * * * "One who is not a party to the injunction suit, but who is within the class of persons whose conduct is intended to be restrained * * * is guilty of contempt."

12 *Am. Jur.* "Contempt," Sec. 26, p. 407.

Power to punish for contempt is inherent in all Courts and is essential to preserve order in judicial proceedings and the enforcement of judgments; it inheres

in the dignity of the Court itself, and is an attribute as essential and indispensable to the true administration of justice as the person of a judge.

Socotch vs. Board of Liquor Control, 66 O. L. Abs. 225.

Proceedings in contempt cannot be held to await the determination of the main proceedings and a breach of an injunction may be punished before the equities in the principal case are settled.

Ex parte Miller, 87 Am. St. Rep. 49.

"The only legitimate inquiry in a contempt proceeding based upon the violation of an injunction is whether the Court granting it had jurisdiction of the parties and of the subject matter; the question whether the order was erroneous will not be considered. If the Court had the jurisdiction required, the fact that its power was erroneously exercised does not render the injunction void, but only voidable on proper application; and, until set aside or revoked, is entitled to implicit obedience."

12 *Am. Jur.* "Contempt" Sec. 26, page 408.

Syl. 2. "Violation of an Order of Court, whether it be *right or wrong, just or unjust* by any of the parties bound by it is punishable as contempt against the Court." (Emphasis ours.)

Shipping Room Suppliers vs. Schoenl 97 N. E. (2nd) 432, C. P. Franklin Co., Ohio.

JUSTICE FRANKFURTER.

The recent utterance of Justice Frankfurter is especially pertinent to this case, it follows as reported in the press:

> "To bring a case here when there is no 'special and important' reason for doing so, when there is no reason other than the interest of a particular litigant, especially when the decision turns solely on a view of conflicting evidence or the application of a particular local doctrine decided one way rather than another by a court of appeals better versed in the field of such local law than we can possibly be, works inroads on the time available for new study and reflection on those classes of cases for the adjudication of which this court exists."

HARVARD LAW REVIEW.

In the June, 1959 issue of the "Review," Vol. 72, No. 8, will appear an article on the within case under "Recent Cases," entitled:

> CONTEMPT—WHAT CONSTITUTES CONTEMPT—VIOLATION OF UNAUTHORIZED TEMPORARY INJUNCTION HELD CONTEMPT.—*State ex rel. Beil v. Dota* (Ohio 1958).

The closing paragraph reads as follows:

> "Applying these tests it seems that the court in the present case reached the correct result. The enjoining court's order is not frivolous since it is arguable that the temporary injunction granted was implicitly authorized by the statutory power to issue temporary orders against tampering with evidence. Furthermore, it is also arguable that the government is excused from the ordinary bond requirement and the court consequently is empowered to grant the temporary injunction under its general injunctive powers. Any harm to the defendant seems compensable, and

even if it were not, his failure to move to have the order modified and his disregard of a possibly effective appellate procedure should be sufficient to preclude collateral attack. Finally, even if the direct-attack procedure were ineffective, the disobedience would appear to be contumacious in that the potential injury to the state if the defendant could have tampered with evidence seems to outweigh any potential injury to the defendant discernible from the facts of the case."

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

THOMAS A. BERG,
Prosecuting Attorney,

HAROLD H. HULL,
Assistant Prosecuting Attorney,
Counsel for Respondent.

Dated May 27th, 1959.